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**November 5, 2015**

John Morris  
Boathouse on the Bay  
190 N. Marina Drive  
Long Beach CA 90803

VIA CERTIFIED MAIL

Mike Donelon  
Action Sports Kids Foundation  
6245 E. Golden Shore  
Long Beach, CA 90803

Maria De La Luz Garcia  
City Clerk, City of Long Beach  
333 W. Ocean Boulevard, Lobby Level  
Long Beach, CA 90802

**Re: Notice of Legal Obligation for Big Bang on the Bay Fireworks Display  
60-Day Notice Letter; CEQA and Coastal Act Requirements**

Dear Mr. Morris et al,

Please accept this notice letter on behalf of, Coastal Environmental Rights Foundation ("CERF") regarding your ongoing, and anticipated future non-permitted discharge of pollutants from firework displays into Alamitos Bay and the Pacific Ocean, in violation of the Clean Water Act ("Act")<sup>1</sup>, the California Water Quality Control Plan for Ocean Waters of California, the Coastal Act, and the California Environmental Quality Act (CEQA).

CERF is a nonprofit environmental organization founded by surfers in North San Diego County and active throughout California's coastal communities. CERF was established to aggressively advocate, including through litigation, for the protection and enhancement of coastal natural resources and the quality of life for coastal residents. CERF urges the Boathouse on the Bay, Action Sports Kids Foundation, and the City of Long Beach ("City") (collectively "Responsible Parties") to cease their unlawful discharges into Alamitos Bay. Moving forward with the annual July 3<sup>rd</sup> display will subject the Responsible Parties to enforcement action and civil liability.

Section 505(b) of the Clean Water Act requires that sixty (60) days prior to the initiation of a citizen's civil lawsuit in Federal District Court under Section 505(a) of the Act, a citizen must give notice of the violations and the intent to sue to the violator, the Administrator of the U.S. Environmental Protection Agency, the Regional Administrator of the U.S. Environmental Protection Agency for the region in which the violations have occurred, the U.S. Attorney General, and the Chief Administrative Officer for the State in which the violations have occurred (33 U.S.C. § 1365(b)(1)(A)). This letter provides notice of the Responsible Parties' Clean Water Act violations and CERF's intent to sue.

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<sup>1</sup> 33 U.S.C. § 1342(1)

**I. Boathouse, Ask Foundation, and City of Long Beach Are Responsible Parties**

The Responsible Parties are responsible for funding and/or carrying out the annual July 3<sup>rd</sup> Big Bang on the Bay fireworks in Alamitos Bay ("Event"), and are therefore subject to liability under the Clean Water Act.<sup>2</sup> The City of Long Beach ("City") also processes approvals<sup>3</sup> for the Event, while the ASK Foundation is a co-applicant for Event permits.

For four years, the Boathouse has raised funds for the Event. As a result of the Event's fireworks display, substantial amounts of pollution are released into the Bay, in violation of the Clean Water Act and California Water Code.<sup>4</sup>

No Clean Water Act permit has ever been obtained for such discharges, despite the annual increase in resultant pollution. According to local Long Beach press, the 2015 event cost \$70,000, which was particularly high because *more* fireworks were added to the display.<sup>5</sup>

**II. Clean Water Act**

The Clean Water Act prohibits the "discharge of any pollutant," unless otherwise allowed by permit.<sup>6</sup> A National Pollutant Discharge Elimination System (NPDES) permit must be issued before any pollutant is discharged into Waters of the United States from a point source.<sup>7</sup> "Any discharge of pollutants not allowed by a NPDES permit is illegal."<sup>8</sup> Under the Act, an NPDES permit is required when a discharger has (1) discharged (2) a pollutant (3) to waters of the United States (4) from a point source.<sup>9</sup>

The Responsible Parties have violated and will continue to violate section 1342(1) of the Clean Water Act unless and until they obtain an NPDES for their firework discharges. Because the Responsible Parties' Event has been, and will continue to be a continuous point source of pollution to Alamitos Bay and the Pacific Ocean, the Clean Water Act mandates that an NPDES permit be obtained.<sup>10</sup>

**A. The Responsible Parties discharge chemicals and paper trash associated with fireworks.**

When the Responsible Parties discharge fireworks in Alamitos Bay, chemicals contained in fireworks fall into the Pacific Ocean, as does paper trash (potentially laden with chemicals) encasing the fireworks. Fireworks that are launched but which do not explode, so-called "dud" fireworks, also

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<sup>2</sup> 33 U.S.C. § 1365(a).

<sup>3</sup> See Long Beach Municipal Code Section 5.60 *et seq*

<sup>4</sup>

[http://www.gazettes.com/lifestyle/alamitos-bay-celebrates-fourth-with-a-bang/article\\_2a0eda9e-204c-11e5-9d05-83092a294b9f.html](http://www.gazettes.com/lifestyle/alamitos-bay-celebrates-fourth-with-a-bang/article_2a0eda9e-204c-11e5-9d05-83092a294b9f.html), enclosed herewith as Exhibit 1

<sup>5</sup> *Id.*

<sup>6</sup> 33 U.S.C. § 1311(a).

<sup>7</sup> 33 U.S.C. § 1342(1).

<sup>8</sup> *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153 (9th Cir. 2002).

<sup>9</sup> 33 U.S.C. §§ 1311(a), 1342(a). See also *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993).

<sup>10</sup> 33 U.S.C. § 1342).

discharge into the ocean. This satisfies the first element requiring an NPDES permit.

Discharge is defined in the Act as "any addition of any pollutant to navigable waters from any point source."<sup>11</sup> Fireworks generally include the following chemicals: perchlorate salts, aluminum, magnesium, titanium, barium copper, chloride, and potassium nitrates.

Other hazardous chemical compounds often associated with fireworks include, but are not limited to: arsenic salts, strontium salts, lithium salts, calcium salts, sodium, barium, cadmium, copper, aluminum, titanium, lead, mercury and magnesium. Many of these compounds are often constituents of fireworks for the purpose of creating color and light effects. These constituents have a potential to adversely impact and contribute to degradation of water and sediment quality in Alamitos Bay and the Pacific Ocean.<sup>12</sup> Of particular concern are arsenic, mercury and lead. These metals are extremely poisonous to human and marine life, and can lead to serious long-term illnesses such as cancer.<sup>13</sup>

**B. The discharged fireworks and the chemicals contained therein constitute pollution under the Clean Water Act.**

The Clean Water Act defines "pollutant" through a specific list of qualifying contaminants.<sup>14</sup> The broad list includes "solid waste...munitions, [and] chemical waste....".<sup>15</sup> The Responsible Parties' discharge of fireworks into Alamitos Bay fits squarely into all three of these categories of pollutants.

Therefore, because the particulate matter, trash, and "dud" fireworks discharged have the potential to degrade the chemical constitution of Alamitos Bay, they qualify as "chemical waste" under the broad categories set forth by the Clean Water Act.

**C. The discharged fireworks are deposited into Alamitos Bay, and the Pacific Ocean, navigable waters of the United States.**

The third element necessitating an NPDES permit requires that the pollution be deposited into a navigable water of the United States. This element is applicable here because the fireworks have a fallout zone that includes Alamitos Bay and the Pacific Ocean, navigable waters of the United States.

According to University of Utah Meteorology Prof. Kevin D. Perry, the particulate from fireworks has a fallout zone of between 500 and 2,000 feet.<sup>16</sup> Perry goes on to state that "heavy

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<sup>11</sup> 33 U.S.C. § 1362(12).

<sup>12</sup> (See Order No. R9-2011-0022, General National Pollutant Discharge Elimination System Permit, [http://www.waterboards.ca.gov/sandiego/board\\_decisions/adopted\\_orders/2011/R9-2011-0022.pdf](http://www.waterboards.ca.gov/sandiego/board_decisions/adopted_orders/2011/R9-2011-0022.pdf)

<sup>13</sup> See, e.g., N. Irving Sax & Richard J. Lewis, Sr., DANGEROUS PROPERTIES OF INDUSTRIAL MATERIALS (Van Nostrand Reinhold, New York, 1989, 7th ed.).

<sup>14</sup> 33 U.S.C. § 1362(6).

<sup>15</sup> *Id.*

<sup>16</sup> Amy Davis & Gar Smith, Fallout Over Disneyland, 17 EARTH ISLAND JOURNAL, 2 (Summer, 2002).

metals contained in the fireworks can travel over 100 km downwind over a two day period".<sup>17</sup>

**D. The fireworks are discharged from a point source.**

The barges from which the Responsible Parties' fireworks are launched function as point sources for discharge of polluting chemicals, thereby fulfilling the fourth element requiring the filing of an NPDES permit. Under the Clean Water Act, a "point source" is defined as "any discernible, confined and discrete conveyance... including but not limited to any...vessel or other floating craft, from which pollutants are or may be discharged."<sup>18</sup>

In summary, the Responsible Parties' non-permitted discharge of fireworks violates the Clean Water Act because the particulate matter from the fireworks qualifies as a pollutant that is discharged from a point source into the Pacific Ocean, a navigable water of the United States.<sup>19</sup>

**E. Clean Water Act Remedies – Expiration of 60-day Notice Period**

Upon expiration of the 60-day period, CERF will file a citizen suit under Section 505(a) of the Clean Water Act for the above-referenced violations. During the 60-day notice period, however, CERF is willing to discuss effective remedies for the violation noted in this letter. If you wish to pursue such discussions in the absence of litigation, it is suggested that you initiate those discussions immediately. If good faith negotiations are not being made, at the close of the 60-day notice period, CERF will move forward expeditiously with litigation.

CERF's action will seek all remedies available under the Clean Water Act §1365(a)(d). CERF will seek the maximum penalty available under the law which is \$37,500 per day. CERF may further seek a court order to prevent the Responsible Parties from discharging pollutants. Lastly, section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs, including attorneys' and experts' fees. CERF will seek to recover all of its costs and fees pursuant to section 505(d).

CERF has retained legal counsel to represent it in this matter. Please direct all communications to Coast Law Group:

**Marco A. Gonzalez**  
**Livia Borak**  
**COAST LAW GROUP LLP**  
**1140 S. Coast Highway 101**  
**Encinitas, CA 92024**  
**Tel: (760) 942-8505 x 102**  
**Fax: (760) 942-8515**  
**Email: [marco@coastlawgroup.com](mailto:marco@coastlawgroup.com)**  
**[livia@coastlawgroup.com](mailto:livia@coastlawgroup.com)**

CERF will entertain settlement discussions during the 60-day notice period. Should you wish

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<sup>17</sup> *Id.*

<sup>18</sup> 33 U.S.C. § 1362(14)(emphasis added).

<sup>19</sup> See, San Diego Regional Water Quality Control Board Counsel Memo "Analyzing Whether Fireworks Are Point Source Discharges under Clean Water Act," enclosed herewith as Exhibit 2

to pursue settlement, please contact Coast Law Group LLP at your earliest convenience

### **III. Fireworks Displays Require a Coastal Development Permit.**

The Responsible Parties must also obtain a Coastal Development Permit ("CDP") pursuant to the Coastal Act for their fireworks displays.<sup>20</sup> A recent appellate court decision upheld the California Coastal Commission's finding that a fireworks display is a "development" under the Coastal Act.<sup>21</sup>

Although the Event has been given a temporary event exclusion for the past few years, the Coastal Commission has never looked into the environmental impact of the Event. In particular, the Event's timing and proximity to numerous roosting and foraging birds, including endangered and special status species, is likely to result in adverse environmental impacts.<sup>22</sup> (See Temporary Events Guidelines, §III.(b)). Indeed, because the City has failed to conduct the necessary CEQA review for the Event, these impacts have not been adequately characterized and the Commission has therefore not had an opportunity to study the full impacts of the Event.

Further, the influx of thousands of spectators on Marina Drive<sup>23</sup> seriously restricts and impedes the public use of roadways and parking areas. (See Temporary Events Guidelines, §III.(c)). Indeed, the Event's Special Event Permit requires the beach area to be cleared and staffed by local security, precluding its use by the general public because of the Event. (Special Event Agreement Number 15-08384, p. 4).

In light of these impacts, and its unique circumstances, the Event does not qualify for a temporary event exclusion. The Responsible Parties must therefore obtain a CDP.

### **IV. The Event Requires CEQA Review.**

For four years, the City has approved a Special Event Permit for the Event. Though the Event is temporary, it nonetheless qualifies as a "project" under CEQA. The Event easily meets the first part of the CEQA "project" definition: "an activity which may cause either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment...". (Pub. Res. Code §21065). The Event's fireworks show results in significant individual and cumulative effects in the following impact areas: (i) water quality; (ii) wildlife and marine life, specifically marine mammals and birds; (iii) air quality; (iv) noise<sup>24</sup> and (v) traffic.

Despite its annual review of the Event, the City has never conducted the requisite CEQA analysis prior to its approval of the Special Event Permit or allocation of financial resources to the

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<sup>20</sup> Coastal Act is Public Resources Code § 30000 *et. seq.*

<sup>21</sup> *Gualala Festivals Committee v. California Coastal Com.*, (2010) 183 Cal. App. 4th 60, 70.

<sup>22</sup> Environmental Impact Report, Alamitos Bay Marina Rehabilitation Project City of Long Beach, Section 4.3, available at <http://www.lbds.info/civica/filebank/blobdload.asp?BlobID=3141>

<sup>23</sup> See

[http://www.gazettes.com/lifestyle/alamitos-bay-celebrates-fourth-with-a-bang/article\\_2a0eda9e-204c-11e5-9d05-83092a294b9f.html](http://www.gazettes.com/lifestyle/alamitos-bay-celebrates-fourth-with-a-bang/article_2a0eda9e-204c-11e5-9d05-83092a294b9f.html) ("Marine Drive is, like, insane" said [Morris]).

<sup>24</sup> The 2015 Special Event Permit for the Event specifically noted the City's Noise Ordinance restricts noise between 7AM and 10PM to no more than 50dB(A). Not only does the Event concert likely exceed this noise restriction, but CERF volunteers have measured noise levels from other community fireworks shows as high as 110 dB(A) at about 400 feet away from the launch zone.



Event. This is improper. "CEQA requires that an agency determine whether a project may have a significant environmental impact, and thus whether an EIR is required, *before* it approves that project." (*Laurel Heights Improvement Assn. v. Regents of University of California*, (1988) 47 Cal. 3d 376). "Just as CEQA itself requires environmental review before a project's approval, not necessarily its final approval (Pub. Resources Code, §§ 21100, 21151), so the guideline defines 'approval' as occurring when the agency first exercises its discretion to execute a contract or grant financial assistance, not when the last such discretionary decision is made." (*Save Tara v. City of West Hollywood*, (2008) 45 Cal. 4th 116). An award of financial assistance is a clear, binding commitment of resources that must be preceded by environmental review. (*Citizens for a Megaplex-Free Alameda v. City of Alameda*, (2007) 149 Cal. App. 4th 91 ["Thus, the DDA is indisputably a commitment by the City to issue grants, loans, and other forms of financial assistance. The City's undertaking to issue such financial assistance is an "approval" as defined by the Guidelines. (Guidelines, § 15352, subd. (b))"], emphasis added).

Indeed, though the Long Beach Municipal Code requires the City Manager first determine a proposed event "will not have a significant adverse environmental impact" prior to issuing a Special Event Permit, the City has never undertaken such review. (Long Beach Municipal Code §5.60.040.I.12).

Because the City has systematically failed to conduct the requisite CEQA review prior to approving the Special Event Permit and allocating financial resources to the Event, it has failed to comply with not only CEQA, but its Municipal Code as well.

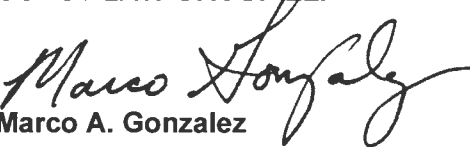
#### **V. Conclusion**

In light of the numerous legal repercussions to moving forward with the Big Bang on the Bay, CERF urges the Responsible Parties to give considerable weight to the prospect of legal enforcement.

If you have any questions, please contact Coast Law Group LLP at your earliest convenience.

Sincerely,

**COAST LAW GROUP LLP**

  
Marco A. Gonzalez

  
Livia Borak  
Attorneys for  
Coastal Environmental Rights Foundation

Enc. Exhibit 1: Article  
Exhibit 2: San Diego Regional Water Quality Control Board Chief Counsel Memo

**CERF 60-Day Notice Letter  
CEQA Review  
November 5, 2015  
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**CC:**

<b>Jared Blumenfeld, Region 9 Administrator Alexis Strauss, Deputy Regional Administrator U.S. EPA, Region 9 75 Hawthorne Street San Francisco, CA, 94105</b>	<b>Samuel Unger, Executive Officer Frances McChesney, Office of Chief Counsel Los Angeles Regional Water Quality Control Board 320 W. Fourth Street, Suite 200 Los Angeles, CA 90013</b>
<b>Gina McCarthy EPA Administrator Mail Code 4101M USEP A Ariel Rios Building (AR) 1200 Pennsylvania Avenue N.W. Washington, DC 20004</b>	<b>Thomas Howard Executive Director State Water Resources Control Board P.O. Box 100 Sacramento, CA 95812-0110</b>
<b>Charles Posner California Coastal Commission South Coast Area Office 200 Oceangate Suite 1000 Long Beach, CA 90802</b>	

## **EXHIBIT 1**



## Alamitos Bay Celebrates Fourth With A Bang

By Emily Thornton  
Staff Writer Jul 2, 2015



—Gazette file photo

Celebrating the Fourth of July a day early is the norm for the Big Bang on the Bay. The fourth annual July 3 fireworks event may be seen around Alamitos Bay.

The show includes a vintage aircraft flyover, sailing regatta, skydivers and, of course, fireworks. At 5:30 p.m., a block party kicks off the evening's activities on the side of The Boathouse on the Bay. The restaurant at 190 North Marina Dr. has hosted the event every year.

"There's not much more you can add to this event," said John Morris, general manager of the restaurant.



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[7be85424e60e&r=http://teamspiritlb.com/%3Futm\\_source%3Dgazetteinstory%26utm\\_medium%3DBanner%26utm\\_campaign%3DTeamSpirit](http://www.gazettes.com/tncms/tracking/bannerad/clicks?i=ros/fixad-big-ad-top-asset1/4dfd6dd4-37b8-11e5-874f-7be85424e60e&r=http://teamspiritlb.com/%3Futm_source%3Dgazetteinstory%26utm_medium%3DBanner%26utm_campaign%3DTeamSpirit)

DJ Ron will spin records at the block party. The Boathouse on the Bay will offer dining and viewing packages at \$40 for block party seating, \$60 for inside seating and \$95 for patio seating. For, children ages 10 and younger, admission is \$20. Lucille's Smokehouse Bar-B-Que is catering the family-style barbecue dinner.

Four skydivers — one with a 10-foot American flag — will appear overhead at around 6:45 p.m. Vintage military aircraft also will fly overhead. A sailing regatta escorting a 100-foot barge carrying fireworks will appear at 7 p.m.

The tab for the whole event is \$70,000, Morris said, because he added more fireworks. The show will last about 25 minutes, beginning at 9 p.m. Morris said he's added surround sound to this year's fireworks display, courtesy of Free Conference Call.

"We'll have a great sound effect on the bay," Morris said. "Everyone will dial in for the music... It's coming together real nice," he said.

Morris said when he was thinking of starting an event on the bay for the Fourth, he ran into trouble.

"The city wouldn't let me do it," he said.

Having an early event helped alleviate July Fourth congestion, he said. Although, he said, the area booms during the bay's event.

"Marina Drive is, like, insane," he said.

He said he expects thousands of people, including the locals, who are the key players in the event. He didn't want to specify a number in case the city decided to charge more for his event permit.

"It's a very local event really... The community of the city of Naples are the big supporters of this event," he said.

The 500 Club, consisting of Naples and Peninsula waterfront residents, F&M Bank, Free Conference Call and Alamitos Bay Landing donated to the event. Many residents also donated through the Bronze \$1,000 Club.

Proceeds for the Big Bang will go to the Action Sports Kids Foundation (ASK), a nonprofit Long Beach organization that provides youth an alternative to streets and gangs with sports, education and arts. The group created the Long Beach Skate Park Program.

Morris said he was pleased with efforts to make the Big Bang a little different than other Fourth celebrations.

"The whole event is out of the ordinary," he said.

For more information and tickets, visit [www.boathouseonthebay.com/july-3-party.php](http://www.boathouseonthebay.com/july-3-party.php) (http://www.boathouseonthebay.com/july-3-party.php) or call (562) 493-1100. For more information on the ASK Foundation, visit [www.asklongbeach.org](http://www.asklongbeach.org) (http://www.asklongbeach.org).

*Emily Thornton can be reached at [ethornton@gazettes.com](mailto:ethornton@gazettes.com) (mailto:ethornton@gazettes.com).*

Emily Thornton ([https://gazettes-dot-com.bloxcms.com/users/profile/Emily Thornton](https://gazettes-dot-com.bloxcms.com/users/profile/Emily%20Thornton))

Emily is a staff writer covering higher education and other various topics for Gazette Newspapers. She has a background in weekly and daily newspapers and a bachelor's in communication at La Sierra University.

## EXHIBIT 2



Linda S. Adams  
Acting Secretary for  
Environmental Protection

# State Water Resources Control Board

## Office of Chief Counsel

Charles R. Hoppin, Chairman  
1001 I Street • Sacramento, California 95814 • (916) 341-5161  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
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Edmund G. Brown Jr.  
Governor

**TO:** San Diego Water Board Members  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123-4340

**FROM:** Jessica M. Newman *Catherine George Hagan*  
Catherine George Hagan *Jessica Newman*  
Staff Counsel  
Advisory Counsel for Tentative Order R9-2011-0022, General National  
Pollutant Discharge Elimination System (NPDES) Permit for Residual  
Firework Pollutant Waste Discharges to Water of the United States in the  
San Diego Region From the Public Display of Fireworks

**DATE:** April 20, 2011

**SUBJECT:** Memorandum Analyzing Whether Fireworks Are Point Source Discharges  
under Clean Water Act

### Background

The Regional Water Quality Control Board, San Diego Region (San Diego Water Board) is considering adoption of a national pollutant discharge elimination system (NPDES) permit for residual firework pollutant waste discharges to waters of the United States. The permit would cover public displays of fireworks in the San Diego region and uses a tiered approach to regulating the firework displays. Several comment letters received by the San Diego Water Board expressed the view that fireworks are not a point source discharge that could be regulated through an NPDES permit.

### Question Presented

Are fireworks that enter waters of the United States a point source discharge?

### Brief Answer

Yes, fireworks are a point source. The definition of a point source must be read broadly to protect water quality. While courts have not considered the issue of whether fireworks are a point source, courts have found that ordnance from military aircraft, spent shot from a gun fired over water, and pesticides sprayed via airplane or helicopter over water are all point sources. For fireworks, the point source is the instrument that shoots the firework into the air and causes the discharge.

### Discussion

California Environmental Protection Agency



San Diego Water Board Members

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The Clean Water Act (CWA) prohibits the discharge of any pollutant by any person except when compliant the requirements in an NPDES permit. (33 U.S.C. §§ 1311(a); 1342.) The definition of "discharge of a pollutant" means "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." (33 U.S.C. § 1362 (12).) To explain that definition, the CWA also defines a "pollutant" and a "point source." A pollutant is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharge into waste." (33 U.S.C. § 1362(6).) The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C. § 1362(14).)

The goals of the CWA must drive any analysis of the terms of the statute. The CWA was designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a); see also *U.S. v. Lambert* (S.D.W. Va. 1996) 915 F.Supp. 797, 801.) Therefore, the "guiding star is the intent of Congress to improve and preserve the quality of the Nation's waters." (*American Petroleum Institute v. E.P.A.* (10th Cir. 1976) 540 F.2d 1023, 1028; see also *Kennecott Copper Corp. v. E.P.A.* (10th Cir. 1979) 612 F.2d 1232, 1236.) All further analysis must be viewed with this in mind.

In light of the goals of the CWA, courts have very broadly interpreted the definition of a point source. The Second Circuit Court of Appeals stated that the definition "embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." (*Peconic Baykeeper, Inc. v. Suffolk County* (2d Cir. 2010) 600 F.3d 180, 188 (quoting *Cordiano v. Metacon Gun Club, Inc.* (2d Cir. 2009) 575 F.3d 199, 219; *Dague v. City of Burlington* (2d Cir. 1991) 935 F.2d 1343, 1354-55); see also *Northwest Environmental Defense Center v. Brown* (9th Cir. 2010) 617 F.3d 1176, 1183; *United States v. Earth Sciences, Inc.* (10th Cir. 1979) 599 F.2d 368, 373.) One comment letter noted that the federal regulations interpreting the definition of a point source have focused on industrial sources. (Letter from Latham & Watkins on behalf of the La Jolla Community Fireworks Foundation (December 9, 2010) at p. 5.) While industrial sources may be common discharges, the definition of a point source is much broader than just that category of discharges. The Ninth Circuit Court of Appeals noted that Senate Committee Report "instructed that the [EPA] Administrator should not ignore discharges resulting from point sources other than pipelines or similar conduits... There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, trucks, and other conveyances." (*Northwest Environmental Defense Center v. Brown, supra*,



617 F.3d at p. 1183 (quoting Sen.Rep. No. 92-414, at p. 51 (1971).) Thus, a broad interpretation of “point source” must be used when determining whether fireworks are a point source.

While a court has not yet reviewed the specific issue of whether fireworks are point sources, courts have looked at similar discharges that are not explicitly identified in the definition of a point source. Ordnance fired from a military aircraft into the water has been held to be the addition of a pollutant from a point source that requires an NPDES permit. (*Romero-Barcelo v. Brown* (1st Cir. 1981) 643 F.2d 835, 861 rev'd sub nom. *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305.) The ordnance fired from the military aircraft included accidental bombings of the navigable waters and the occasional intentional bombing of water targets. (*Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 307.) Even though the ordnances did not frequently enter the water, the military still needed an NPDES permit to comply with the CWA. The district court, when looking at the facts, held that an NPDES permit was required notwithstanding the fact that the Environmental Protection Agency did not have any regulations governing the issuance of an NPDES permit to cover ordnances entering the water, and that there was no evidence that the ordnances had measurable deleterious effects on the water. (*Romero-Barcelo v. Brown* (D.P.R. 1979) 478 F.Supp. 646, 664 aff'd in part, vacated in part, (1st Cir. 1981) 643 F.2d 835 rev'd sub nom. *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305.)<sup>1</sup> When comparing fireworks to ordnances, both contain pollutants that are discharged from an untraditional source that had not been previously regulated.

Spent shot and target fragments from trap shooting over the water are also discharges of a pollutant over navigable waters. (*Stone v. Naperville Park Dist.* (N.D. Ill. 1999) 38 F.Supp.2d 651, 655; see also *Connecticut Coastal Firemen's Association v. Remington Arms Co.* (2d Cir. 1993) 989 F.2d 1305, 1313 (finding that lead and steel shot are both “pollutants” under the CWA).) In *Stone*, the court held that the trap shooting range and each firing station were a “point source” under the CWA. (*Stone v. Naperville Park Dist.*, *supra*, 38 F.Supp.2d at p. 655.) The court found that the whole purpose of the facility was to “discharge pollutants” in the form of lead shot and fragmented targets and the facility was “discernable, confined and discrete.” (*Ibid.*) Similarly, the point of the instruments that set off fireworks is to discharge pollutants, i.e. shoot the firework into the air to allow the firework to explode and produce the colorful effect we all see. The firework itself is the pollutant, much like the bullet is the pollutant at a firing range.

The interpretation of the instrument setting off the firework being the point source is confirmed by an analysis of the word “from” in the phrase “...addition of any pollutant to navigable waters from any point source.” (33 U.S.C. § 1362(12).) When looking at

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<sup>1</sup> The district court and the 1st Circuit Court of Appeals both decided that a NPDES permit was required for the discharge; however the Supreme Court did not rule on the issue and focused entirely on another element of the case.

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pesticides sprayed into the air over navigable waters from a truck and helicopter, the Second Circuit Court of Appeals found that the point source was not the air but rather the spray apparatus that was on the truck or helicopter. (*Peconic Baykeeper, Inc. v. Suffolk County* (2d. Cir. 2010) 600 F.3d 180, 188.) Even though the pesticides were being sprayed into the air, the spray apparatus was the starting point and so was the point source. (*Ibid.*) The same analysis applies to fireworks that explode in the air. The discharge comes from the instruments that shoot the fireworks into the air and not from the air after the fireworks explode. Therefore, the instruments that set off the fireworks are the point source from which the pollutants in the fireworks are discharged.

### **Conclusion**

The CWA is designed to protect our nation's waters, and it accomplishes that task by prohibiting the discharge of pollutants from a point source without a permit. Fireworks that enter navigable waters are a discharge of pollutants from a point source. Courts have held that similar activities like firing ordnances from military aircraft or firing shots at clay targets are considered point sources. The device that sets off the firework is a discrete, identifiable instrumentality that discharges the firework into the air and causes the pollutants to enter the navigable waters. Since there is a discharge of pollutants from a point source, the San Diego Water Board may properly regulate fireworks through an NPDES permit.

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